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No. 84-920

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PAUL ROBINSON, *et al.*,
Petitioners,
v.
STATE OF NEW JERSEY, *et al.*,
Respondents.

JOSEPH W. ANTONACCI, *et al.*,
Petitioners,
v.
STATE OF NEW JERSEY, *et al.*,
Respondents.

ALLEN OLSEN, *et al.*,
Petitioners,
v.
STATE OF NEW JERSEY, *et al.*,
Respondents.

REPLY BRIEF FOR THE PETITIONERS

NELSON KIEFF
(Counsel of Record)
8001 Braddock Road
Suite 600
Springfield, Virginia 22160
(703) 321-8510

JEFFRY A. MINTZ
Mesirov, Gelman, Jaffe,
Cramer & Jamieson
900 Kings Highway, North
Cherry Hill, New Jersey 08034
(609) 667-9695

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1. The Opposition (Br. 8-10) contends that the principles of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and *Ellis v. Railway Clerks*, 104 S. Ct. 1883 (1984) control here. They argue that the holding below accords with the "teachings in *Abood* and *Ellis*" and does not conflict with the decisions of this Court.

The Court of Appeals held the challenged statute facially constitutional. It approved requiring nonunion employees to subsidize union political and ideological activities including union efforts to influence the formation of law or public policy whose subject matter is akin to subject matter "dealt with at the bargaining table in the private sector." Opp. Br., 8. Respondents contend (Opp. Br., 6, 9) that this decision is supported by this Court's perception that "line drawing" between collective bargaining and unrelated ideological activities may be difficult in the public sector. *Abood*, 431 U.S. at 236. In *Abood* this Court noted that "the *process of establishing a written collective bargaining agreement* . . . may require not merely concord *at the bargaining table*, but *subsequent approval* by other public authorities . . . as an *integral part of the bargaining process.*" *Id.* Respondents argue that " 'unions *must* advance the collective interests of their members in a number of [noncollective bargaining process] arenas.' " Opp. Br., 6. They justify this conclusion because the state's constitution and statutes limit (Pet., 5-6) the rights granted public employees and the scope of exclusive representatives' duties in the collective bargaining process. Because governmental processes in the noncollective bargaining arenas deal with matters that might be addressed at the private sector bargaining table, Respondents argue (Opp. Br., 9) that the state may force its employees to finance subject-matter-related political activities. They view (Opp. Br., 5-8) the holding of the Court of Appeals as a necessary accommodation of the governmental rights of the individual to the "practical reality" of the bargaining process in New Jersey.

In the petition (at 11-17) we argued that the decision in this case squarely conflicts with the Constitution and this Court's decisions. To the extent that the "teachings of *Abood* and *Ellis*" are pertinent, the decision below undermines their meaning. In *Abood* this Court acted to preserve our democratic system "whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political [and ideological] concern." 431 U.S. at 243 (Rehnquist, J., concurring). It rejected the notion that application of First Amendment principles might yield to the legislature's legitimate interest to regulate the statutory right of employees to bargain collectively with a government employer. In *Abood* and other decisions this Court emphasized that full First Amendment protections do not depend on the subject matter of speech or the status of the speaker. This Court has never permitted a legislature to restrict the fundamental rights of one group of citizens in order to advance the interests of another.

The Court of Appeals approved a statute that forces a "nonmember" to contribute to the exercise of the collective membership's governmental rights. It approved a statute that forces the individual to pursue an annual rebate through a statutorily imposed and exclusive process designed and dominated by the self-interested organization. Pet., 6. It thus approved a scheme that mandates unbridled discretion in a private person to determine the fundamental procedural and substantive rights of another. If the guarantees of the Bill of Rights and the decisions of this Court mean anything, it can hardly be doubted that they have their fullest and most urgent application precisely to the conduct of this case. The freedoms of

petition and association and the promise of a government-controlled timely procedure would prove empty if, as the Court of Appeals would have it, a citizen's control over his decision to participate in political, lobbying and ideological activities could be delegated or bargained away.

We noted (Pet., 17) that the Court of Appeals took a facile approach to this case and looked no further than the general power of a legislature to require financial support of an exclusive representative's discharge of *duties* in the collective bargaining process. But this Court has repeatedly required "[e]ach regulation . . . be examined in terms of its potential impact upon fundamental rights, the importance of the end sought and the necessity of the means adopted." *United States v. Robel*, 389 U.S. 258, 270-71 (1967) (Brennan, J., concurring). Subsequently, the Court voided the state's attempt to inhibit freedom of choice, *Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965), or restrict people's will to expend monies to advance public policies, ideas, or legislation. *Buckley v. Valeo*, 424 U.S. 1, 48-51 (1976); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

The teachings of *Abood, Ellis* or any other case do not support the "subject matter" bridge which the Court of Appeals built across the chasm "between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which compulsion is prohibited." *Abood* at 236. This Court has squarely rejected just such an effort to distort the distinction between collective bargaining and protected activities in order to restrict core First Amendment freedoms. *Madison Joint School Dis-*

trict v. Wisconsin Employment Relations Commission, 429 U.S. 167, 174-76 & n.10 (1976). The "criterion" for this fundamentally important distinction is "not the terminology used by the legislature" or the Court of Appeals "but the *process* used by the parties." C. Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156 (1974). *See also, Township of West Windsor v. PERC*, 78 N.J. 98, 111-15 (1978).

Prior to the challenged statute's existence, the union Respondents advanced their members' interests in the "arenas" of public debate. Public policy and law—indeed this very statute—not a unit's contract, emerged from their organized influence and use of financial resources. Their constitutional right to pursue such interest—to assemble, discuss and plan for furthering their own self-interests in jobs—cannot be construed as a constitutional approval of advantage to them over others who choose "nonmembership" or different associations. *Lincoln Federal Labor Union v. Northwestern I & M Co.*, 335 U.S. 525, 530-33 (1949). The Court of Appeals cannot so facilely blur the vital distinctions between the separate processes and their incident activities. Collective bargaining in New Jersey, App. 190a-191a, is no different than in Michigan, *Abood*, 232, or the private sector, 29 U.S.C. § 158 (d).

For these reasons the decision below cannot be squared with the Constitution, the decisions of this Court, or with common sense. The First Amendment, and the Equal Protection and Due Process Clauses of the Constitution place "[o]ne's right[s] to free speech,"

petition and association beyond the reach of majorities and legislatures. *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

2. The Court of Appeals and Respondents (Opp. Br., 5, 8, 15-17) rely on the Railway Labor Act cases and *Abood* to provide the mode of analysis for the claims at bar. That reliance is misplaced for numerous reasons.

(a) The instant case presents a facial attack against a specific legislative act. *Hanson* and *Abood* challenged only the "bare authority" to require support to a union acting as an exclusive representative. (b) This Court has never encountered a statutory scheme (aside from that presented in *Champion v. Deukmejian*, Petition No. 84-1010) that looks and operates like the instant one. Pet., 6. (c) This case arose in the federal system under a specific remedial authorization, 42 U.S.C. § 1983, with a jurisprudence designed "to further transcendent legislative purposes." *See, e.g., Albermarle Paper Co. v. Moody*, 422 U.S. 405, 415-17 (1975). (d) Unlike cases of Respondents' chosen mold, this case seeks remedies against government. Pet, 15 n.10. (e) There were no due process issues in the other cases.

(f) In their pertinent parts *Abood*, *Street*, and to a degree *Ellis* involved "as applied" claims and postjudgment remedies. In such challenges this Court typically limits its analysis "to the concrete case before" it. *Members of City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2127-28 (1984). In this instance, however, by their First Amendment claims Petitioners properly seek to protect significant societal interests broader than their

own. *See, e.g., Secretary of State of Maryland v. Joseph H. Munson Co.*, 104 S. Ct. 2839, 2852 n.13 (1984). In the due process claims as well, it is not just Petitioners, but organized society as a whole, that is wronged by the failure to afford that right. *See* Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 44 (1980).

The Court of Appeals both acted without regard for the interests of the public in assessing the propriety of injunctive relief and failed to recognize the crucial distinctions between this case and the cases it applied.

3. Respondents contend (Opp. Br., 14) that there is no conflict between the decisions of the Seventh Circuit and Supreme Judicial Court of Massachusetts and the decision below. However, these courts focused expressly on the constitutional duty of government to provide an advance *determination* of an assessment by a *governmental decisionmaker*, which may be a quasi-judicial person in the *first instance*, and subsequent judicial review. *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1192, 1194, 1196-97 (1984); *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 79-82 (1982). Neither the New Jersey statute nor the "ad hoc" union rebate arrangements provide what these courts held to be the constitutionally minimum components of due process.[1]

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[1] A union's "voluntary" decision during litigation to provide a precollection reduction under its idea of the legal purpose, see footnote 2 *infra*, and amounts of such fees does not cure a statute which stands as express authority for providing only postcollection "refunds" under a doubtful standard. The union's newly "evolving" remedy of today may tomorrow become nothing more than history. *See Allee v. Medrano*, 416 U.S. 802, 810-11 (1974). Its decision to escrow a unilaterally deter-

Petitioners claimed a right to a neutral and detached government decisionmaker in the first instance. Contrary to the Respondents' contention, immediate and irreparable harm occurs from the requirement to submit non-members' interests in property and liberty to a union forum, even if ultimately there would be a *de novo* government procedure. *Gibson v. Berryhill*, 411 U.S. 564, 574-75, 577 (1973). *See also*, *Fuentes*, 407 U.S. at 82.[2]

The asserted denial of due process and equal protection, and the infringements of substantive liberty were not prospective and remote at the time the injunction issued. These injuries occurred when the legislature acted and set in operation the statute before the Court. These are actual and likely injuries to rights protected by 42 U.S.C. § 1983. It is beyond the need for citation that the rights at risk here are unique and uncompensable, and their loss an irreparable injury. Yet Respondents contend that injunctive relief pending final judgment is improper

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mined portion of an involuntary collection does not moot the question of injunctive relief. *Hudson*, 743 F.2d at 1196-97. Nor does it resolve the challenge to the statutory system as "abdicat[ing] effective state control over state power." *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972).

[2] When the Court of Appeals vacated the injunction it left Petitioners at the mercy of the exclusive internal union process. Respondent, Rutgers Council, AAUP then received monies held in escrow and began new collections. Their "Representation Fee Review Committee," consisting of three AAUP members, operating under AAUP policy, with assistance of Respondents' counsel, decided what "expenditures" should be included in the end of year, 1983-84 rebate. Their decision was that "the defense of the [instant case constitutes] expenses fully chargeable to representation fees." Thus, Petitioners paid, and will continue to pay, to advance Respondents' defense of a lawsuit claiming ongoing injury to Petitioners' fundamental rights.

"in cases of this sort," and that the Court of Appeals properly vacated the injunction.

The decisions of this Court should not be read to dignify that result. We submit that they will not support it.

CONCLUSION

For all the foregoing reasons this Court should grant the Petition.

Respectfully submitted,

NELSON KIEFF
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

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Attorney for Petitioners